166-463

JAN 23 1897
JAMES H. McKENNEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 223.

THE NATIONAL BANK OF COMMERCE OF SEATTLE,
PLAINTIFF IN ERROR.

VS.

THE CITY OF SEATTLE, AND JOHN M. E. ATKINSON,
AS TREASURER AND EX-OFFICIO TAX COLLECTOR OF SAID CITY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANTS IN ERROR.

JOHN B. ALLEN,
JOHN K. BROWN,
F. B. TIPTON,
Counsel for Defendants in Error.

The Calvert Co., Printers, Seattle.

course of being increased, nevertheless it was not taxable until the completion of the proceedings and the full purchase of the increased stock.

Delano vs. Butler, 118 U. S. 634.

In conclusion it is submitted that no question has been made but that the remedy by which the plaintiff sought to obtain redress is the proper one. A suit in equity by the bank praying an injunction to restrain the collection of a tax and seeking a decree annulling the assessment, was the proper remedy in the case.

Cummings vs. National Bank, 101 U. S. 153.

Andrews vs. King County, 1 Wash. 46 (in which Cummings vs. National Bank is cited with express approval).

Hills vs. Exchange Bank, 105 U. S. 319 (affirming on this point, 5 Fed. 253).

Covington City National Bank vs. City of Covington, 21 Fed. 484.

First National Bank of Toledo vs. Treasurer, 25 Fed. Rep. 749.

First National Bank vs. City of Richmond, 39 Fed. Rep. 509.

National Bank vs. Kimball, 103 U. S. Rep. 732.

Virginia Coupon Cases, 114 U. S. Rep. 316.

Lenawee Co. Savings Bank vs. City of Adrian, 60 Mich. 223.

Osborne vs. Bank, 9 Wheaton, 739.

Howell vs. City of Tacoma, 3 Washington, 744.

* * * * * * *

It is respectfully submitted that the judgment of the Supreme Court of the State of Washington should be reversed, and that that court should be instructed to reverse the judgment of the Superior Court of King County, State of Washington, sustaining the demurrer *ore tenus* of the defendants to the plaintiff's complaint.

EUGENE M. CARR,
HAROLD PRESTON,
JAMES B. HOWE,
Counsel for Plaintiff in Error.

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STATEMENT.

The complaint of the plaintiff in error, being the plaintiff in the original cause, alleges in effect that 2511 shares of the capital stock of the plaintiff in error, being the whole number of its shares, and 1511 shares in excess thereof, were assessed on April 1, 1891, *in solido* to plaintiff in error as owner thereof at $100.00 per share, and the tax levied accordingly. That at that time in the city of Seattle there was moneyed capital owned by individual citizens of the state of Washington, being residents of said city, and there invested in interest bearing loans, discounts and securities owing by other citizens of said state being residents of said city in an amount exceeding six million dollars; that this moneyed capital of the city of Seattle was omitted from assessment by

reason of the concerted action of the county assessors of the state pursuant to the advice of the attorney general of the state, which agreement was adopted by the assessor of said city; that the capitalization of the national banks located in said city then amounted to $1,500,000, and of incorporated state banks there located to $800,000; that in addition to said $6,000,000.00 large sums (the amount thereof not being stated) were invested in said city by residents thereof in stocks and bonds of insurance, wharf and gas companies. That in no case was the stock or shares of stock of any national bank located in said city assessed for taxation at less than its par value; that the total assessed valuation put by said city upon all stocks and bonds mentioned and upon the capital stocks, bonds and shares of banks and banking corporations for the year 1891 was $2,284,000.00, of which $1,766,000.00 was the valuation put upon the stock of national banks located in said city.

Plaintiff in error further alleges that its capital, surplus and undivided profits were invested partly in United States bonds, and the remainder in loans to residents of the state of Washington.

It avers that the treasurer of the city of Seattle is about to distrain its property to secure said tax. It claims that the tax *in solido* is unlawful in method and that the omissions referred to effected a discrimination against the shares of plaintiff in error as a national bank forbidden by Sections 5214 and 5219 U. S. R. S.

Without tendering or offering to pay the amount of tax plaintiff in error ought to pay, it prays for an injunction against the collection of the tax.

Upon the case coming on for trial in the Superior Court of King County defendants objected to the introduction of any evidence on the part of plaintiff on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the objection and rendered judgment of dismissal.

Thereupon plaintiff in error appealed to the Supreme Court of the State, which affirmed the judgment of the court below. From this judgment of affirmance this writ of error is prosecuted.

The statutes pursuant to which the tax in question was levied are Sections 21 and 23, ch. 140, Laws of Washington of 1891, pp. 289 and 290, and are as follows:

"Section 21. Every individual, firm, corporation or association of persons, carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city or village where such bank or banking association is located and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserve fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the state is assessed and taxed: Provided, at the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

"Sec. 23. Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their undivided profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership."

Section 18 of Article 9 of the City Charter of the City of Seattle, in force at the time the assessment was made, reads as follows:

"SEC. 18. A committee of the city council selected as in this charter provided, shall constitute a board of equalization, and shall on the first Monday in August, after the assessor shall have completed and handed in his assessment roll to the city clerk, and after five days' notice published in the city official newspapers, meet to hear and determine all complaints respecting the valuation of property as fixed by the assessor in such roll; provided, however, that before raising an assessment the board shall notify the person interested, by letter or express, post prepaid, and addressed to such place at least three days before action is taken, of the day fixed for the matter to be investigated. Any member of the said board shall have the power to administer oaths and affirmations in matters before said board, and the sessions of said board shall be held from time to time as in its notice specified, for a period of two weeks and no longer."

The opinion of the Supreme Court of Washington is found at 9 Wash. 607.

Plaintiff in errors contends—

1. That the sections of the Washington revenue law of 1891 above quoted are invalid since they provide for the taxing of the capital and property of the bank instead of shares of its stock.

2. That the manner in which the assessment complained of was made constituted it an assessment on the capital and property of the bank and not on the shares of its stock.

3. That the failure to assess the shares of gas and insurance and wharf companies effected a discrimination against shares in national banks.

4. That the omission to assess the other moneyed capital alleged, resulted in the taxation of the shares of national banks at a greater rate than is assessed on other moneyed capital in the state.

5. That the action of the taxing officers complained of, violated the provisions of the federal constitution forbidding states to deprive any person of life, liberty or property without due process of law or to deny any person the equal protection of the laws.

6. That the assessment to plaintiff of 1,511 shares of stock in excess of its capitalization vitiated the assessment.

ARGUMENT.

I.

THE VIOLATION OF THE FEDERAL CONSTITUTION.

(*a.*) This point cannot be raised in this court not having been raised in the court below. The "title, right, privilege or immunity" contended for by the plaintiff in error was not "claimed under the constitution of the United States," and the decision of the court was not against a "title, right, privilege or immunity" so claimed.

Spies v. Illinois, 123 U. S. 131, 181.
French v. Hopkins, 124 U. S. 524.

Clark v. Pennsylvania, 128 U. S. 395, 397.
Morrison v. Watson, 114 U. S. 111, 115.
Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 540.

Even had the point been raised on a petition for rehearing, it would not be considered by this court.

Chappell v. Bradshaw, 128 U. S. 132, 134.
Texas Pacific R. Co. v. Southern Pacific R. Co., 137 U. S. 48, 53.
Caldwell v. Texas, 137 U. S. 692, 698.
Loeber v. Schroeder, 149 U. S. 580, 585.
Bushnell v. Crooke, M. & S. Co., 148 U. S. 682, 689.
Miller v. Texas, 153 U. S. 535, 538.
Sayward v. Denny, 158 U. S. 180.

Being raised for the first time on the assignment of errors, it cannot be considered by this court.

Ansbro v. United States, 159 U. S. 695, 698.

(*b.*) The fourteenth amendment to the federal constitution does not undertake to control the mode of imposing a tax if notice and an opportunity for a hearing are afforded.

Walston v. Nevin, 128 U. S. 578, 582.
Palmer v. McMahon, 133 U. S. 660, 668.
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239.
Paulsen v. Portland, 149 U. S. 30, 41.
Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421, 427.

(*c.*) Nor does this amendment limit the taxing power of the state by imposing on it any rule of equality.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237.
Chester v. Pennsylvania, 134 U. S. 240.
Home Ins. Co. v. New York, 134 U. S. 594, 606.
Pacific Express Co. v. Siebert, 142 U. S. 339, 351.
Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386, 394.
Jennings v. Coal Ridge, etc., Co., 147 U. S. 147.
Giozza v. Tiernan, 148 U. S. 657, 662.

II.

THE STATUTORY PROVISION FOR THE TAXATION OF THE CAPITAL STOCK OF NATIONAL BANKS.

(*a.*) Sections 5214 and 5219 forbid the taxation of the capital and permit only the taxation of shares of stock of national banks.

Van Allen v. The Assessors, 3 Wall. 573.
National Bank v. Commonwealth, 9 Wall. 353, 359.

(*b.*) Sections 21 and 23, ch. 140, Laws of 1891, above quoted, as construed by our Supreme Court provide for the taxation of the shares only of national banks.

Paul v. McGraw, 3 Wash. 296, 303, 307.
First National Bank v. County of Chehalis, 6 Wash. 64.

An instance where words in a statute stating that *capital stock* is to be assessed are assumed to provide a tax on *shares* is found in

Newark Banking Co. v. Newark, 121 U. S. 163, at p. 164.

(*c.*) This construction by the state court will govern this court.

People v. Weaver, 100 U. S. 539.
Palmer v. McMahon, 133 U. S. 660, 665.
First National Bank v. Ayers, 160 U. S. 660, 664.
Stryker v. Goodnow, 123 U. S. 527.
Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162.

(*d.*) No federal question arises where the validity of the state statute is admitted.

Commercial Bank v. Buckingham, 5 How. 317, 342.
Banking Co. v. Marshall, 12 How. 165, 167.

No federal question arises when the exemption from taxation claimed under the federal law is sustained.

Tyler v. Cass County, 142 U. S. 288.

There can be no federal question therefore in this case where the state court construes the statutes as not providing for the taxation of bank capital which the federal law exempts from taxation, and as providing for the taxation of bank shares which the federal law permits to be taxed. If this court would ever depart from its rule of following the construction given to the statute of a state by

its court of last resort, it surely would not violate the rule in order to give the state statute a construction that would render it invalid.

Baltimore Traction Co. v. Baltimore Belt R. Co., 151 U. S. 137.

(*c.*) The assessment of the shares against the bank and the collection of the same therefrom seems to have been contemplated by the framers of the federal statutes and has been repeatedly upheld by this court.

National Bank v. Commonwealth, 9 Wall. 353.
Lionberger v. Rouse, 9 Wall. 468.
Van Slyke v. Wisconsin, Bagnall v. same, 154 U. S. 581.
Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232, 238.

In National Bank v. Commonwealth, 9 Wall. 353, the statutory tax of 50 cents per share was imposed in a lump sum of $4,000 on the bank, the statute nowhere providing for the reimbursement of the bank by the shareholders in any manner whatever.

The bank contended that the tax was practically a tax on itself and not on its shareholders. (9 Wall. 353, 361.)

But this court held that the tax was practically a tax on the shares and the shareholders, and not on the bank or its capital.

In Waite v. Dowley, 94 U. S. 527, this court held that this assessment of the tax against the bank was an illustration of the general rule of Section 5219 U. S. Revised Statutes, remitting the *method* of taxing bank shares to the states, which rule empowered the states to require bank cashiers to furnish to the tax officers of the state certificates containing information useful or necessary in order to ascertain the value of the shares and the residence of their owners.

So true is it that the payment by the bank of taxes on its shares is a payment of the shareholders' money that it was the duty of the bank to include the amount of such payments in the statement of its earnings on which, under the Act of June 30, 1864, an internal revenue tax was required to be paid.

Central National Bank v. United States, 137 U. S. 355, 363.

Plaintiff in error in its brief, mistakenly cites City of Boston v. Beal, 51 Fed. Rep. 306, as supporting the doctrine that when the bank charges the tax paid to its expense account, the tax falls not on the shareholder but on the bank; but an examination of that case shows that the payment of the tax by the bank is practically a payment by its shareholders except when by reason of the insolvency of the bank, the payment by the bank causes the tax ultimately to fall on its creditors.

In this case no insolvency of the plaintiff in error is alleged. This court does not try moot cases whether the questions involved relate to the taxation of national banks or otherwise.

Waite v. Dowley, 94 U. S. 527, 534.

Plaintiff in error in its brief accuses the Supreme Court of Washington of confounding the method of collection with the power to assess. It will be observed that if that court is guilty as charged it is so in company with this court when it decided National Bank v. Commonwealth, 9 Wall. 353, where the statute the tax under which was upheld, provides only for assessment of the tax against and payment by the bank and ignores the shareholders altogether.

(*f.*) The tax on the shares may be collected from the national bank by distraint.

First National Bank v. Douglas County, 3 Dillon, 330, 334.
National Bank v. Morrison, 1 McCrary, 204.

III.

THE LISTING IN SOLIDO BY THE ASSESSOR.

(*a.*) This listing being in compliance with the statutes and approved by the Supreme Court of Washington was valid.

(*b.*) The listing of the shares alleged in the complaint shows that the tax was imposed on the shares and not on the capital.

The allegation in the complaint (par. 5 f. 3) is that the assessor "did list to the complainant as owner thereof, 2,511 shares of complainant's capital stock, valuing the same for the purposes of assessment and taxation thereunder at the rate of $100.00 per share, and did list the same *in solido* to complainant as owner thereof at a total valuation of $251,100 00."

It appears, therefore, by the allegations of the complaint, that the assessment was not *in solido* at all, the use of that expression being simply the pleader's characterization of the facts antecedently alleged, namely, that 2,511 shares of complainant's capital stock was listed to the complainant.

The true meaning of the expression "*in solido*" is an assessment of the CAPITAL STOCK of the bank, as such, as distinguished from an assessment on the shares.

Conceding as claimed by plaintiff in error, that national banks and the shares thereof may be taxed by the state only, to the extent granted by federal legislation, we fail to find any provision of law or any decision of this Court which even intimates that it is unlawful to list or assess the shares in the name of the bank.

The case of National Bank v. Commonwealth, 9 Wall. 353, bears directly on this point. That decision fully sustains the position that the shares may be listed and assessed directly against the bank as the agent of its shareholders.

A careful examination of Section 5219 Revised Statutes U. S., makes it plain that Congress intended that the taxes on the shares should be collected by proceedings against the shareholders' interest in the bank itself. That section provides:

"The legislature of each state may determine and direct the manner and place of taxing all the shares of National Banking Associations within the state, subject only to the two restrictions; that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any National Banking Association owned by non-residents of any state shall be taxed in the city or town where the bank is located and not elsewhere."

It will be observed in the first place, that the manner of taxing the shares is left entirely to local legislation. The word "manner" can mean nothing but the mode of listing and assessing the property and collecting the tax. In the second place, the taxes and shares of non-residents are to be taxed WHERE THE BANK IS LOCATED, AND NOT ELSEWHERE. By what possible means can a tax be collected on the shares of non-residents except by making the stockholders' interest in the bank liable therefor by some kind of proper legislation?

The provisions of this section in relation to taxation of shares

of non-residents, seems to have been entirely overlooked in the cases cited by appellant, namely:

First National Bank v. City of Richmond, 39 Fed. 309.
National Bank v. City of Richmond, 42 Fed. 877.

On the point, therefore, of the claimed assessment "*in solido*," we say that no assessment "*in solido*," properly so-called, is alleged, and the mode of the assessment as alleged is the mode approved by this court.

The shares of national banks are not aliquot parts of its capital, but are themselves a distinct species of property.

Exchange Bank v. Miller, 19 Fed. 372.

In arguing this proposition, counsel for plaintiff in error assumes that because property is listed to or in the name of the bank, it necessarily follows that it is the proprietary interest of the bank which is assessed. Such is not the case. The manner of making up an assessment roll is a thing usually regulated by law, and by section 5219 the federal government leaves the mode of making up the roll to the determination of the state legislature. Such laws usually provide in what name property shall be assessed. By the revenue law of 1891 real property was not assessed in the name of any person.

Revenue Law of 1891, Section 45.

By section 8 of the same law, property of a minor child is listed in the name of the guardian, or the person having such property in charge; the property of an idiot or lunatic is listed by the person having charge of the property; the property of a person for whose benefit it is held in trust, by the trustee, executor or administrator; the property of corporations whose assets are in the hands of receivers, by such receivers or their agents; money and property in litigation in the possession of any county officer must be assessed to the custodian thereof and the taxes thereon paid by the custodian.

Many other similar provisions are common in all tax laws, and it is entirely erroneous to assume, because the shares are listed and assessed in the name of the bank, that the proceedings amount to a tax against the bank. As well might guardians and receivers claim that they are entitled to relief against similar assessments.

(*c.*) Section 23, above quoted, makes the bank the agent of the shareholders in paying the tax. This statutory agency of the bank can in no wise be affected by the listing of the shares in the name of the bank. Since the bank pays the whole tax as agent of the shareholders, the names of the shareholders are not necessary to the assessment or collection of the tax, and it is even held that for this reason the furnishing of a list of the shareholders by the cashier to the assessor cannot be compelled.

Paul v. McGraw, 3 Wash. 296.

(*d.*) The Supreme Court of the state having held the action of the assessor to be authorized by the statutes as above construed, there is no federal question.

Sage v. Louisiana Board of Equalization, 144 U. S. 647.

The taxation of the capital of a corporation where its value is ascertained by multiplying the number of shares by the market value of each share is practically equivalent to the taxation of shares at their market value, where no deductions for indebtedness are allowed.

Mercantile Bank v. New York, 121 U. S. 138, 164.

The cases cited by plaintiff in error (on page 9 of its brief), as holding assessments *in solido* invalid are cases in all of which the capital and not the shares were assessed. Also in all these cases except Collins v. Chicago, 4 Bissell, 472, it appears that the state law permitted deductions on account of indebtedness, of the benefit of which deductions the shareholders were deprived by such assessment. Furthermore, in First National Bank of Leoti v. Fisher, 45 Kan. 726, and Miller v. First National Bank, 46 Ohio St. 424, it appears that the state statute expressly requires the listing of the shares in the name of the shareholder.

Since in this case the assessment was of the *shares* and not of the *capital*, since the revenue law of Washington for 1891, allowed no deductions for indebtedness for purposes of assessment or taxation, and since the same law did not require the assessment of the shares in the names of the shareholders, the cases cited have no bearing on the case at bar.

Plaintiff in error at page 10 of its brief mistakenly says, that in National Bank v. Commonwealth, 9 Wall. 353, the assessment

had been made against the stockholders. On the contrary the assessment was a statutory tax of 50 cents per share, assessed against the bank in one sum of $4,000, and the shareholders were not referred to or considered, either in the tax proceedings or in the Kentucky statutes providing for the tax.

Plaintiff in error further contends that the doctrine of National Bank v. Commonwealth, 9 Wall. 353, applies only when suit (in the nature of garnishment) is brought against the bank for the tax and not when the collection of the tax is sought to be enforced by distress, and that Hershire v. First National Bank, 35 Iowa, 272, points out the distinction. On the contrary Bank v. Commonwealth approves the collection of the tax from the bank as a method of collecting from the shareholder, however that collection against the bank may be enforced. It nowhere sets limits by even the remotest implication to the mode of collecting from the bank.

Furthermore, Hershire v. First National Bank was itself an action against a bank for a tax, and the court held that under the Iowa Statute compelling the bank to pay as agent of the stockholders, and the statute requiring an agent to pay taxes for his principal only when he has funds of the principal under his control, in an action to recover the tax from the bank the complaint must allege the existence under the control of the bank of funds of its stockholders.

By a parity of reasoning in this case the plaintiff in error should have alleged in its complaint that it had no funds of stockholders under its control such as surplus, undivided profits or dividends.

IV.

THE FAILURE TO ASSESS STOCKS OF NON-BANKING CORPORATIONS.

The discrimination forbidden by the federal statute is a discrimination as regards "other money capital," not as regards other personal property, or shares of the capital stock of corporations not engaged in the banking business. The exemption of property not "moneyed capital" from taxation, or the taxation of such property at a lower aate than "moneyed capital" causes "no taxation greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

First National Bank v. Waters, 7 Fed. Rep. 152.
McMahon v. Palmer, 102 N. Y. 176.
People v. Commissioners, 4 Wall. 244.
Mercantile Bank v. New York, 121 U. S. 138.
Palmer v. McMahon, 133 U. S. 660, 667.
Talbot v. Silver Bow Co., 139 U. S. 438.

It is contended by plaintiff in error that it appears by the complaint that six million dollars of money capital has escaped assessment and taxation in the City of Seattle, and therefore the assessment and taxation of the shares of the national banks was void.

A careful examination of the allegations of the complaint in the light of the decisions of this court upon this subject will show that there is no allegation that "taxable moneyed capital" has been exempted in such a manner as to amount to discrimination against the shares of national banks. The first decision of this court bearing directly upon this point was that of "Hepburn v. School Directors, 23 Wall. 480."

The question there involved was whether the exemption from local taxation of mortgages, judgments, recognizances and moneys due upon agreements for the sale of real estate in the hands of individuals was so substantial in its nature and operation as to affect the integrity of a general assessment for local purposes. In holding that this exemption did not amount to any discrimination against national banks, the court said:

"This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it."

It is the established law, therefore, that the exemption of mortgages and the debts represented thereby, is a just exemption made to avoid double taxation, and is no discrimination.

The complaint does not allege that the money capital which is invested in loans, discounts and securities, was anything more than *mortgage debts*.

The plaintiff in error not having negatived the proposition that this moneyed capital is and was mortgage debts, it must be assumed that such was the fact, and that the full amount of this capital has been properly taxed by the taxation of the property mortgaged.

In the case of Boyer v. Boyer, 113 U. S. 689, cited by plainitff in error, the court found that an illegal discrimination resulted from the laws of Pennsylvania and on this point the court says:

"The burden of county taxation imposed by the latter act has at all events been removed from all bonds or certificates of loan issued by any railroad company incorporated by the state; from shares of stock in the hands of stockholders of any institution or company of the state which in its corporate capacity is liable to pay a tax into the State Treasury under the act of 1859; from mortgages, judgments and recognizances of every kind; from money due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for state purposes, when such corporations pay into the State Treasury the required tax on such indebtedness."

It will be observed that this exemption is much broader than as stated in plaintiff in error's brief, as it includes much in addition to "mortgages, judgments and recognizances."

In the late case of Mercantile Bank v. New York, 121 U. S. 138, the case of Boyer v. Boyer, is greatly modified, while that of Hepburn v. School Directors is expressly approved.

It appears from the case of Mercantile Bank v. New York, that a state can legitimately exempt deposits in savings banks, though amounting to enormous sums, municipal bonds of large amount, and shares of stock in trust companies, the companies themselves being subject to another tax. The court says:

"The main purpose, therefore, of Congress in fixing the limits to state taxation on investments and the shares of national banks was to render it impossible for the state in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

And further:

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loans, discounts or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as invest-

ment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

It will be see by the foregoing quotation that it is the use of money for the purpose of making a profit by its use as money, when the same is carried on as a business, that constitutes moneyed capital within the meaning of the law. It will be further seen that in this very exhaustive definition of moneyed capital, in which every word and clause seems to have been selected with the greatest desire for accuracy and plain statement, the word "mortgage" is carefully excluded. In connection with this fact it is worthy of consideration that near the close of the opinion, again referring to the cases of Hepburn v. School Directors and Adams v. Nashville (in which last case the court held that municipal bonds could properly be exempted without exempting national bank shares,) the court proceeds:

"The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

Reading, then, the language of the complaint in the light of the exhaustive definition of this court, we find:

First. The complaint in this case, unlike the complaint in other cases which have been before this court, does not state any facts bringing to the knowledge of the court any exemption of moneyed capital. The use of the term "moneyed capital" in the complaint, is a mere legal conclusion. The pleader should state specifically the property omitted from taxation.

Second. It does not appear but that the moneyed capital exempted consisted of deposits in savings banks or other matter exempted, which as above noticed, the state had a right to exempt.

Third. It does not appear but that all the loans, discounts,

and securities were simply mortgage debts, which as above noticed, the state had a right to exempt.

Construing together the decisions in Hepburn v. School Directors, and Mercantile Bank v. New York, there can be no doubt, we think, but that this court wishes it plainly understood that it is not necessary to impose a double burden of taxation upon mortgaged property in order to require national bank shares to pay their proper portion of the public expenses.

V.

THE OMISSION TO TAX PERSONAL CREDITS.

(*a*). This omission is alleged in the complaint to have been made pursuant to an opinion of the attorney general duly rendered, of which opinion the Supreme Court of Washington took judicial notice.

First National Bank v. Chehalis County, 6 Wash. 64, 70.

In this opinion the attorney general held that with the exception of credits of banks and bankers, brokers and stock jobbers, bonds, bank stocks and stocks other than bank stock, "credits" were exempt from taxation.

Opinions Attorney General, 1891, p. 59.

These exempted credits consisted mainly of accounts, promissory notes and mortgages.

First National Bank v. Chehalis County, 6 Wash. 64, 70.

It thus appears that the exempted credits consisted in part of "moneyed capital" and in part of other choses in action.

It also appears that while some "moneyed capital" was exempt, such moneyed capital as consisted of credits of banks and bankers, brokers and stock jobbers, of bonds, of corporate stocks, or of cash or bullion, were not exempt at all.

Secs. 3, 4, 16, 21, 22, 23, ch. 140, Laws of Wash. 1891, pp. 281, 282, 285, 289, 290.

(*b*). This court has repeatedly held that the federal inhibition of taxation that discriminates against national banks has no application to general exemption laws founded on just reason and

not operating as an unfriendly discrimination against investments in national bank shares.

People v. The Commissioners, 4 Wall. 244.
Hepburn v. School Directors, 23 Wall. 480.
Adams v. Nashville, 95 U. S. 19.
Mercantile Bank v. New York, 121 U. S. 138, 161.
Bank of Redemption v. Boston, 125 U. S. 60, 68.

1. The exemption of credits in this case subserves the purpose of preventing double taxation.

Opinions Attorney General, 1891, p. 59.

Such a purpose is recognized by this court as a legitimate basis for an exemption law, though some moneyed capital is thereby rendered exempt.

Hepburn v. School Directors, 23 Wall. 480.

2. The exemption in question is not an unfriendly discrimination against national banks. The exemption is of certain classes of credits. Only a small fraction of the exempt credits was embraced in the term "moneyed capital;" only a small fraction of "moneyed capital" was comprised in the exempt credits. The consequence could not be, either in intent or effect, an unfriendly discrimination against national banks.

"Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital as such is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt"

Hepburn v. School Directors, 23 Wall. 480, 485.

3. Under the revenue law of 1891, both the assets and shares of non-banking corporations in Washington are taxable.

Secs. 3, 20 and 21, ch. 140, Wash. Laws, 1891, pp. 280, 289.
Sec. 16, Id. (item 23 in list).

The assets of national banks consisting largely of promissory notes are exempted from taxation by the federal law. The exemption in question gives to the residents and corporations of the

state the benefit of a portion of the exemption enjoyed by national banks.

4. The exemption in question does not affect capital engaged in the banking business. State banks in Washington are assessed in the same manner as national banks.

Secs. 21 and 23, ch. 140, Wash. Laws, 1891, pp. 289, 290.

Private and foreign bankers are assessed in the full amount of the money used in their business.

Sec. 22, ch. 140, Wash. Laws, 1891, p. 290.

Banks, bankers, brokers and stock jobbers are required to list for taxation all their credits.

Sec. 16, ch. 140, Wash. Laws, 1891, p. 286 (item 21).

It is apparent, therefore, that the exemption in question does not, in the language of Justice Matthews, in Mercantile Bank v. New York, 121 U. S. 138, 155, "create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character."

Bressler v. Wayne, 32 Neb. 834, 843.

Compare Van Allen v. Assessors, 3 Wall. 573, with People v. Commissioners, 4 Wall. 244.

5. The capital represented by shares in national banks is largely engaged in dealing in credits that are within the exemption in question. The capital employed in the business of dealing in exempt property should not itself be exempt. It is no discrimination, therefore, against shareholders of national banks to exempt, in addition to accounts, promissory notes and mortgages in buying and selling and holding which their capital is used.

6. The exemption in question besides diminishing double taxation, served to encourage thrift and savings. The exception of banks and bankers from this exemption is in harmony with this purpose, since the encouragement of thrift among the people in general does not require the extention of the exemption to banks and bankers, brokers and stock jobbers.

The exemption of savings bank deposits being an exemption of

moneyed capital that does not compete with the business of national banks and being founded in reason, causes no discrimination against shares in national banks though such savings in the state amount to $500,000,000 and upwards.

Mercantile Bank v. New York, 121 U. S. 138, 160.
Bank of Redemption v. Boston, 125 U. S. 60, 68.

(*c.*) The question of the sufficiency of pleadings to present a matter for determination is one of state law and involves no federal question.

Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 91.
Moore v. Missouri, 159 U. S. 673, 678.
Caldwell v. Texas, 137 U. S. 692, 698.

Iowa Central Railway Co. v. Iowa, 160 U. S. 389, 393.
Leeper v. Texas, 139 U. S. 462, 468.

This being an independent ground of decision, not involving a federal question, and broad enough to support the judgment of the state court, the writ should be dismissed.

Williams v. Weaver, 100 U. S. 547.
Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 640.

In any case the complaint fails to show that the moneyed capital exempted from taxation was of such character or was in such considerable quantity as regards the total moneyed capital of the state and such as was invested in shares of national banks as to affect any actual discrimination.

First National Bank v. Ayres, 160 U. S. 660, 667
Dutton v. Bank 53 Kan. 440, 461.

The exemption of an amount of moneyed capital large in itself but small relatively to the whole amount of moneyed capital cannot be deemed an unfair discrimination.

Mercantile Bank v. New York, 121 U. S. 138, 161.

Plaintiff in error complains that the average assessment of shares of national bank stock was 18 per cent. above par while that of state bank stock was 35 per cent. below par. No showing is made as to the relative average value of the respective shares. The greater security to customers of national banks,

resulting from their careful supervision by the government might well make their shares more valuable than those in state banks.

Furthermore, there is no allegation that the difference in the assessment, if prejudicial, was due to any unfair provision of law or rule of assessment. Such an averment is necessary to render the complaint good on demurrer.

National Bank v. Kimball, 103 U. S. 732, 735.

Plaintiff in error argues that the exemption of credits alleged, subjects its shares to a tax that is *excessive* whether void or not.

For any erroneous or excessive taxation it had ample and complete remedy by making application to the city board of equalization.

Stanley v. Supervisors of Albany, 121 U. S. 535, 551.

If the excessive tax was so imposed as to enable a court of equity to interfere, plaintiff should have paid or tendered the tax rightfully due.

State Railroad Cases, 92 U. S. 575, 616.
Cummings v. National Bank, 101 U. S. 153.
National Bank v. Kimball, 103 U. S. 732.
Albuquerque Bank v. Perea, 147 U. S. 87, 90.

This rule prevails in Washington.

Andrews v. King County, 1 Wash. 46, 54.

A state statute forbidding deduction from bank shares that are allowed generally from credits is not *void*, it is simply inoperative as to persons entitled to deductions.

Supervisors v. Stanley, 105 U. S. 305.

By a parity of reasoning the tax is not void if a discrimination exists; it is inoperative to the extent of the excess caused by the discrimination and the remainder should be paid or tendered.

VI.

THE ALLEGED ASSESSMENT OF 1,511 SHARES IN EXCESS OF BANK'S CAPITALIZATION

This point alleged in the brief of the plaintiff in error as its seventh assignment of error was not presented by it to the Supreme Court of the state in its brief or there urged as ground for reversal of the judgment of the Superior Court. It is presented only in the allegations contained in the fourth and sixth paragraphs of the complaint (volume 2 of transcript), the former of which alleges "that the stock of the plaintiff consists of 1,000 shares of $100 each," and the latter of which alleges "that the said assessor thereupon proceeded to make out an assessment roll for said city, wherein *inter alia* he did list to the plaintiff as owner thereof 2,511 shares of plaintiff's capital stock, valuing the same, for the purposes of assessment and taxation thereunder at the rate of $100 per share * * * ." Taking as true the explanation contained on page 19 of the brief of plaintiff in error, viz.: that the capitalization of the bank was in course of being increased, and (what is not said, but implied in said brief) that the 1,511 shares assessed in excess of the 1,000 shares, alleged in the complaint to be the full number representing the capital of the bank, was the number of new shares subscribed towards the proposed increase, and also conceding the correctness of the abstract principle of law that the increase is not taxable until *all* of the increase has been subscribed and paid for and until the Comptroller of the Currency has duly certified to the increase, still the *complaint* in this action is not sufficient in that respect to warrant the granting of the injunction asked for. If the facts stated in the complaint be true, the amount of tax which plaintiff should have paid, upon its own theory of what number of its shares were taxable, was easily ascertainable by computation and until it had paid or tendered payment of such amount, it has no standing in a court of equity to ask that the city be prevented from collecting the whole tax because a portion of it was illegally levied.

In State Railroad Tax Cases, 92 U. S. 575, 616, in considering this question, it was said by this court: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is

found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

Defendants in error therefore believe that they may fairly ask this court to hold —

1. That the decision of the Washington Supreme Court that the complaint was too vague and indefinite to allege sufficiently a discrimination against the shares of the plaintiff in error involved no federal question and was broad enough to support its judgment, and hence that the writ of error should be dismissed.

2. That the complaint does not sufficiently allege a discrimination against the shares of the plaintiff in error in the matter of taxation.

3. That the statutes of Washington as construed by its supreme court provide for the taxation of the shares and not the capital of national banks, and that the collection of the tax from the banks is valid.

4. That the assessment in this case was of the shares and not of the capital of the plaintiff in error.

5. That the exemption of the credits specified neither contemplated nor effected a discrimination against shares of National Banks.

6. That the federal constitution has not been violated by the taxing officers of the state, and no right claimed thereunder has been denied by the Washington courts.

7. That the complaint does not show that before the commencement of this action the plaintiff had availed itself of the

tribunals provided by the laws of the state to obtain a proper review of the assessment upon its shares.

Respectfully submitted, JOHN B ALLEN,
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